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November 3, 2017

BY ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: *Ex Parte* Communication in: MB Docket No. 15-216 (Good Faith Negotiation); MB Docket No. 10-71 (Retransmission Consent); MB Docket Nos. 14-50, 09-182, 07-294, 04-256 (Local Media Ownership); GN Docket No. 16-142 (ATSC 3.0)

Dear Ms. Dortch:

On November 1st and 2nd, representatives of the American Television Alliance met with the offices of Chairman Pai, Commissioners O'Rielly, Carr, and Rosenworcel, and the Media Bureau to discuss the draft Media Ownership and ATSC 3.0 orders released last week.[1] We suggested improvements to the draft orders that would more fully protect viewers and minimize the potential for harm to consumers and competition demonstrated in the record.

- With respect to Media Ownership, in any "case-by-case" analysis of top-four ownership, the Commission should explicitly consider the effect of the proposed combination on retransmission consent rates (which, in turn, impact the prices consumers ultimately pay), in addition to the other factors listed in the draft.

- With respect to ATSC 3.0, the Commission should consider modifications to the simulcast, notice, retransmission consent, and other sections of the draft.

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[1] A list of the attendees at each meeting can be found in Appendix A hereto. The two draft orders can be found at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1026/DOC-347455A1.pdf ("Draft ATSC 3.0 Order") and http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1026/DOC-347453A1.pdf ("Draft Media Ownership Order").

I. Media Ownership.

The draft order proposes to allow applicants to "request a case-by-case examination of a proposed combination that would otherwise be prohibited by the Top-Four Prohibition."[2] Applicants would be able to show that particular top-four combinations "serve the public interest, convenience, and necessity"[3] because the "benefits . . . exceed the harms in certain circumstances based on the evaluation of the characteristics of a particular market or a particular transaction."[4]

ATVA continues to support the top-four prohibition as currently formulated because of the demonstrated harms top-four combinations cause.[5] If the Commission nonetheless plans to weigh the "benefits and harms" of top-four combinations on a case-by-case basis, it should acknowledge that it has already done a good deal of the weighing. The Commission has already found that permitting a single entity to negotiate retransmission consent on behalf of more than one top-four station in a single market will "invariably tend to yield" higher retransmission consent fees.[6] It also has found that such increases may cause "pressure for retail price increases."[7] And it has found that the harms caused thereby "outstrip any efficiency benefits" from joint negotiation."[8] Congress later codified and expanded this rule.[9] The Department of

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2 Draft Media Ownership Order ¶ 81.

3 *Id.* Appendix A (proposed new 47 C.F.R. § 73.3555(b)(2)).

4 *Id.* ¶ 80.

5 *See, e.g.*, Letter from Michael Nilsson to Marlene Dortch, MB Docket Nos. 15-216, 10-71, 14-50, 09-182, 07-294, and 04-256 (filed Feb. 17, 2017); Letter from Michael Nilsson to Marlene Dortch, MB Docket Nos. 15-216, 10-71, 14-50, 09-182, 07-294, 04-256 and 17-179 (filed Aug. 17, 2017) ("Aug. 17 Letter").

6 *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351 ¶ 10 (2014) ("*Joint Negotiation Order*") ("[J]oint negotiation among any two or more separately owned broadcast stations serving the same DMA will invariably tend to yield retransmission consent fees that are higher than those that would have resulted if the stations competed against each other in seeking fees.").

7 *Joint Negotiation Order* ¶ 17.

8 *Id.* ¶ 10 ("With regard to Top Four broadcasters, we can confidently conclude that the harms from joint negotiation outstrip any efficiency benefits identified and that such negotiation on balance hurts consumers.").

9 STELA Reauthorization Act of 2014, Pub. L. No. 113-200, § 103(a); 47 U.S.C. § 325(b)(3)(C)(iv) (subsequent legislation requiring the Commission to "prohibit a television broadcast station from coordinating negotiations or negotiating on a joint basis with another television broadcast station in the same local market . . . to grant retransmission consent

Justice then relied on similar conclusions in requiring divestitures in the Nexstar-Media General merger.[10]

Of course, the *Joint Negotiation Order* contained rules about joint *negotiation* because the Commission had no reason to consider the effect of joint *ownership*.[11] The Commission's rules already generally prohibited common ownership of such stations.[12] Indeed, the *Joint Negotiation Order* arose in the first place because of broadcaster attempts to circumvent the FCC's joint ownership limits. But harms caused by joint negotiation and joint ownership of top-four stations are precisely the same—and the *Joint Negotiation Order* cannot fairly be read to suggest otherwise.[13] If a party can increase prices when it can negotiate on behalf of two non-

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under this section to a[n MVPD], unless such stations are directly or indirectly under common *de jure* control permitted under the regulations of the Commission…").

[10] *See* Competitive Impact Statement at 8, *United States v. Nexstar Broad. Grp.* (D.D.C. Sept. 2, 2016) (No. 1:16-cv-01772-JDB), https://www.justice.gov/atr/case-document/file/910661/download.

[11] Likewise, STELAR dealt with joint negotiation because it had no reason to consider the effect of joint ownership. Congress, in other words, legislated against the backdrop of this same rule. So when it adopted a formulation that did not prohibit joint negotiation among commonly owned stations, it had no reason to think this formulation would generally apply to top-four stations. Rather, it would apply only to combinations *not* covered by the rules—such as stations with non-overlapping contours, or combinations of top-four and non-top four stations, or stations subject to waiver. In any event, the Congressional prohibition on joint negotiation was "broader than, and thus supersede[d], the Commission's [then] existing prohibition." *Implementation of Sections 101, 103 and 105 of the STELA Reauthorization Act of 2014*, 30 FCC Rcd. 2380, ¶ 4 (2015). We do not claim that STELAR *precludes* the Commission from adopting a case-by-case approach in this proceeding. We merely argue that STELAR's "common *de jure* control" neither compels this approach nor, properly understood, supports it in any way.

[12] 47 C.F.R. § 73.3555(b).

[13] One footnote in the *Joint Negotiation Order* states: "We do not apply the rule to stations that are commonly owned because we find that joint negotiation by such stations does not present the same competitive concerns as joint negotiation by separately owned stations." *Joint Negotiation Order* ¶ 24 n.92. This, however, cannot be read as suggesting that the Commission's findings about retransmission consent price increases *do not apply* in instances of common ownership.

- To begin with, such a reading contradicts basic economic logic, the entire economic analysis in paragraphs 11-15, and the empirical data presented in paragraphs 16-17. None of these materials excluded common ownership. Indeed, the two economic reports most heavily relied upon by the Commission *explicitly* discussed common ownership. One examined whether top-four stations "are able to act as a single entity for purposes of negotiating retransmission consent prices," noted that "[i]n some cases, this occurs

commonly owned top-four stations in a market, it can also increase prices when it owns two top-four stations in that market and negotiates for both.[14] We are aware of no evidence to overcome these conclusions. To the contrary, ATVA and its members have provided new supporting evidence.[15]

Any reasonable (and lawful) weighing of the "benefits and harms" of a proposed top-four combination must take these factors into consideration.[16] Doing so, however, does not mean that

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because the stations are under common ownership" while "in other cases, this occurs because the stations enter into agreements to jointly negotiate retransmission consent prices, even though they are separately owned." Rogerson Joint Control Analysis at 3 (the report is cited in the *Joint Negotiation Order* at ¶ 13 nn. 50, 51; ¶ 14 nn. 56, 57, 58; ¶ 15 n.64, 65; ¶ 20 n.82). The other begins its analysis by explaining why "*Joint ownership or control* of multiple big-four local broadcasters in the same market results in higher retransmission consent fees which are passed through to MVPD subscribers in the form of higher subscription fees." Rogerson Coordination Analysis (the report is cited in the *Joint Negotiation Order* at ¶ 13 n.53; ¶ 14 n. 56; ¶ 16 n.68; ¶ 18 n.77; ¶ 27 n.104).

- Reading footnote 92 to suggest that the *Joint Negotiation Order's* concerns do not apply to common ownership cannot be squared with the *Order's* discussion of the DOJ Merger guidelines, which *only* apply to common ownership. As the Commission noted, the relevant DOJ analysis concerns "[a] merger between two competing sellers." *Joint Negotiation Order* ¶ 14 n.58.
- The better way to read footnote 92 in conjunction with the surrounding discussion is as suggesting that the then-existing cases of joint ownership presented the "competitive concerns" of joint negotiation, and also presented *additional and countervailing* concerns reflected in the process for obtaining joint ownership in the first place. As an adjoining footnote specifies, a single entity can own two top-four stations in a market—but only if it first makes an economic showing to the Commission to justify such ownership (such as a failing station waiver). *Id.* ¶ 24 n.94 ("*See* 47 C.F.R. § 73.3555 Notes. For example, Top Four stations that the Commission has permitted to be commonly owned, operated, or controlled pursuant to a waiver of the local television ownership rule will be permitted to engage in joint negotiation."). That, of course, is exactly the sort of case-by-case analysis that we suggest the Commission adopt here.

[14] Rogerson Coordination Analysis at 6 (outlining economic theory).

[15] *See* Letter from Michael Nilsson to Marlene Dortch, MB Docket No. 15-216 *et al.* (filed Oct. 25) ("ATVA Oct. 25 Letter") (describing testimony from executives of ATVA member companies that entities controlling more than one top-four station in a single market can increase prices).

[16] As we have pointed out, the Commission must take these findings into account, or explain why they are no longer valid or otherwise should not apply, in order to meet its obligations under the Administrative Procedure Act. *See* Aug. 17 Letter at 5, *citing* U.S.C. § 706(2)(A); *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 545–549

the Commission must abandon its proposed case-by-case approach. Rather, as *part* of that approach, a television station proposing a top-four combination should submit evidence to demonstrate one of the following:

1. *That the harm recognized in the* Joint Negotiation Order *regarding retransmission consent fees would not occur in this particular case.*[17]

2. *Voluntary commitments that would prevent such harm that the top-four combination would otherwise enable.*

3. *That the other benefits of the combination outweigh the harms of increased retransmission consent fees.*

Again, this formulation does not mean that an entity can never obtain two-top four stations, or that retransmission consent prices can never increase. It simply means that the Commission will weigh the harm it has acknowledged such combinations can cause against the benefits an applicant can demonstrate.

The Commission should likewise consider the demonstrated harms caused by top-four combinations when stations seek to distribute multiple "Big Four" networks in a market through means other than common ownership of full-power stations (including through ownership or control through low power stations or multicasts). It should seek comment on this issue in any forthcoming *Quadrennial Review* proceeding.

(1978); *Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[17] In economic terms, such evidence could show that the two stations are not "considered *by an MVPD seeking carriage rights* to be at least partial substitutes for one another." *Joint Negotiation Order* ¶ 14 (emphasis added). None of the suggested showings contained in the draft order speak to this question. In particular, ratings data cannot demonstrate whether *MVPDs* view particular stations as substitutes. They at most reflect the aggregate of *subscriber* viewing habits over time, which is not the same thing. Nor do they reflect the depth of subscriber interest for a particular station, a key factor in determining substitutability from the MVPD's perspective.

II. ATSC 3.0.

A. Simulcasting.

Throughout the ATSC 3.0 proceeding, we have argued that the transition should leave no viewer worse off.[18] Broadcasters claim that marketplace incentives alone will accomplish this.[19] We remain skeptical. We presume that broadcasters, as economically rational actors, seek to maximize profit. Thus, to the extent a broadcaster can make more money through its ATSC 3.0 service, we expect that it would take steps to pressure consumers to adopt this new technology. So, for example, the following circumstances might create "marketplace incentives" that conflict with the public interest:

- If a broadcaster engages in a profitable non-broadcasting line of business with its ATSC 3.0 spectrum, the broadcaster may have a marketplace incentive to "encourage" ATSC 3.0 adoption that would weigh against countervailing incentives to preserve service.

- If a broadcaster receives patent royalties from ATSC 3.0 but not ATSC 1.0, the broadcaster may have a marketplace incentive to "encourage" ATSC 3.0 adoption that would weigh against countervailing incentives to preserve service.

- If eliminating, degrading, or otherwise impairing ATSC 1.0 signals would drive over-the-air consumers to buy new equipment for ATSC 3.0 merely to continue to receive the same quality of programming they receive today, a broadcaster might have a marketplace incentive to take these steps that would weigh against countervailing incentives to preserve service.

In short, the Commission cannot rely entirely on the marketplace to protect viewers.[20] Its rules will have to do so—just as they did in the DTV transition.

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[18] *See* Comments of the American Television Alliance at i, GN Docket No. 16-142 (filed May 9, 2017) ("ATVA ATSC Comments").

[19] *See, e.g.*, Letter from Jerald Fritz to Marlene Dortch, GN Docket No. 16-142 at 2 (filed Oct. 17, 2017) ("Broadcasters have strong economic incentives to maintain service to existing viewers. The Commission should rely on these incentives as broadcasters begin to deploy Next Gen TV and allow stations to make choices that best serve their viewers.").

[20] Were there doubt on this score, broadcasters' arguments that they should be allowed to not simulcast where simulcasting is not "practical," or simulcast in standard definition, or simulcast from far-away "lighthouses," or simulcast different programming, should put such doubts to rest.

1. Non-Degradation.

As we and others have pointed out, simulcasting cannot protect viewers from disenfranchisement if it involves degrading their current service, by, for example, replacing viewers' high definition signals with standard definition signals.[21] Again, if the rules permit broadcasters to degrade the quality of NFL games to standard definition, people will want to know why, particularly after having invested hundreds or thousands of dollars in high definition televisions. The Commission should require any station that transmits in high definition today to simulcast in the same quality high definition during the transition to ATSC 3.0.

The draft order declines to adopt format requirements.[22] It does so in part because "existing rules do not require broadcasters to provide their signals in HD."[23] Yet we do not ask the Commission to require any station to *start* transmitting in high definition. All we ask is that stations not *degrade their existing* format or picture quality as part of the ATSC 3.0 transition—at least not without seeking an FCC waiver due to extenuating circumstances. This is exactly the approach the Commission took in the DTV transition, where it issued rules prohibiting stations from degrading signal quality.[24] The same approach, it seems to us, is the bare minimum that the public interest requires.

The draft order also expresses concerns about "spectrum constraints that could limit [stations'] ability to continue to provide HD programming."[25] Yet the draft offers no evidence to suggest that this will prove the rule rather than the exception. Such concerns are thus better addressed on a case-by-case basis through waivers.

2. LPTV Exemption from Simulcasting.

The draft order requires all stations to simulcast—*except* translators and LPTV stations.[26] It does so despite acknowledging that this exemption will harm both off-air and MVPD

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21 *See* ATVA ATSC Comments at 35.

22 Draft ATSC 3.0 Order ¶ 27.

23 *Id.*

24 *See* 47 C.F.R. § 73.624(b) (providing that "[t]he DTV service that is provided pursuant to this paragraph must be at least comparable in resolution to the analog television station programming transmitted to viewers on the analog channel."); *see generally* Letter from Michael Nilsson to Marlene Dortch at 8, GN Docket No. 16-142 (Sept. 21, 2017) (reiterating the Commission's statutory authority to prohibit format degradation more generally).

25 Draft ATSC 3.0 Order ¶ 27.

26 *Id.* ¶ 40.

subscribers[27] and noting that 42 such stations are affiliates of the "Big Four" broadcast networks.[28] We cannot reconcile this approach with the Commission's extensive findings regarding the necessity of simulcasting more generally.[29] If permitting a full-power network affiliate to transition directly to ATSC 3.0 service will harm viewers, the same concerns apply to LPTV transitions. The Commission should limit this exemption to stations other than the top-six rated stations. As for LPTV stations without simulcast partners, or with good cause to become an "ATSC 3.0 lighthouse,"[30] here again a waiver is the better approach.

3. Simulcast Coverage.

We agree with the Commission's proposed general rule for simulcast coverage—that the simulcast station "retain and continue to cover the station's community of license."[31] This standard should, at least in most cases, sufficiently protect viewers. We object, however, to the notion that stations proposing as much as five percent service loss should receive expedited processing.[32]

The draft order suggests that expedited processing for up to five percent service loss corresponds with the approach taken during the DTV transition and with respect to the post-auction repack.[33] The DTV transition order, however, occurred in the context of an impending statutory deadline that required expedition.[34] The auction repack also involved external reasons

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27 *Id.* ¶ 42.

28 *Id.* ¶ 45 n.126. In addition, we have identified 11 Univision affiliates, 9 Telemundo affiliates, and numerous religious broadcasters among non-Class A LPTVs.

29 *See, e.g.*, *id.* ¶ 16 ("To avoid either forcing viewers to acquire new equipment or depriving them of television service, it is critical that broadcasters continue to provide service using the current ATSC 1.0 standard to deliver DTV service while the marketplace adopts devices compatible with the new 3.0 transmission standard.").

30 *Id.* ¶¶43, 45.

31 *Id.* ¶ 29.

32 *Id.* ¶ 34.

33 *Id.* ¶ 34 n.99, *citing Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 23 FCC Rcd. 2994, ¶ 140 (2007) ("*DTV Order*"); *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Report and Order*, 29 FCC Rcd. 6567 ¶ 551 (2014) ("*Incentive Auction Order*").

34 *DTV Order* ¶ 140 ("To ensure that they meet this deadline, stations should file their applications as soon as possible in order to have the maximum time to order equipment and build their facilities. In order to provide further incentive for stations to timely file applications for their post-transition facilities, we hereby adopt our proposal to provide

for haste (the repurposing of spectrum for use by forward auction winners). It also contained *substantive* rules based on a standard ten times stricter than the processing standard[35]—rules that, we must note, broadcasters called "perverse,"[36] "bad for viewers,"[37] and "devastating," "[g]iven that broadcasters take seriously their obligations to serve their local communities."[38] Here, the circumstances and equities are very different. Congress has not mandated the ATSC 3.0 transition. Moreover, the ATSC 3.0 transition is entirely voluntary for broadcasters. It will occur on a timeline of their choosing, not one imposed externally. In the absence of a congressional mandate, and with the goal of facilitating an entirely voluntary, market-driven process, the Commission should not adopt an expedited processing regime that tips the scale so heavily in favor of broadcasters' preferences and against continued consumer access to broadcast signals.

By the same token, expediting applications involving service loss runs contrary to everything broadcasters have been saying about service losses outside of this proceeding. Just last month, the Commission announced disbursement of $1 billion in auction reimbursement funds,[39] which is about 60 percent of the $1.75 billion that Congress allocated to the Commission for this purpose. Anticipating that their full expenses would exceed Congress' set aside, broadcasters have asked Congress for an additional $1 billion.[40] All of this is predicated on the notion that "*no TV viewer* . . . [should lose] access to the entertainment and lifeline local broadcast programming they rely on today"[41] and that "there is no substitute for broadcasters'

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expedited processing for certain stations that timely apply for a construction permit to build their post-transition channel.").

35 *Incentive Auction Order* ¶ 178 (2014) ("allowing interference from reassignments only in previously affected areas or if any newly interfering station, considered alone, would reduce a station's population served by no more than 0.5 percent").

36 Comments of the National Association of Broadcasters at 24, GN Docket No. 12-268 (filed Jan. 25, 2013).

37 *Id*. at 26.

38 *Id*.

39 *Incentive Auction Task Force and Media Bureau Announce the Initial Reimbursement Allocation for Eligible Broadcasters and MVPDs*, Public Notice, DA 17-1015 (rel. Oct. 16, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1016/DA-17-1015A1.pdf.

40 John Eggerton, *Rep. Pallone Proposes $1B Boost to Auction Repack Fund*, Broadcasting & Cable (July 20, 2017), http://www.broadcastingcable.com/news/washington/rep-pallone-proposes-1b-boost-auction-repack-fund/167313.

41 *NAB Statement on Preliminary Estimate of Repack Costs*, National Association of Broadcasters: News Releases (July 14, 2017) (emphasis added), http://www.nab.org/documents/newsroom/pressRelease.asp?id=4197.

service to their local communities."[42] If such claims have merit, we can see no reason for exceptional, 15-day processing for applications that could result in the loss of service for millions of innocent viewers.[43]

The Commission should instead limit expedited processing of applications involving less than 0.5 percent population coverage, the figure upon which the auction reassignment standard was based. Of course, this does not mean that the Commission must *reject* applications involving meaningful population losses. It simply means that the public should have a reasonable opportunity to comment on such applications.[44]

4. Substantial Similarity.

We agree with the proposed substantial similarity standard.[45] We disagree, however, that the requirement should sunset in five years.[46] The draft order's sole explanation for the sunset is that the requirement "could unnecessarily impede Next Gen TV programming innovations as the deployment of ATSC 3.0 progresses."[47] Yet the rest of the substantial similarity requirement is explicitly designed to prevent such an outcome.[48] The draft order also fails to explain why an automatic sunset is appropriate or rational in light of the Commission's findings necessitating a simulcast requirement in the first instance—or indeed as part of a transition that the draft order intends to be voluntary and market-driven.[49]

Logically, the substantial similarity requirement for simulcasting should last as long as the simulcasting requirement itself—that is, until the Commission "determine[s] in a later proceeding when it would be appropriate for the Commission to eliminate the requirement."[50] After all, simulcasting without substantial similarity is not really simulcasting. We would not object to the Commission revisiting the substantial similarity requirement in five years (or at

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42 National Association of Broadcasters, *114th Congress Broadcasters' Policy Agenda* at 3 (2015), https://www.nab.org/documents/advocacy/NAB2015BroadcastersPolicyAgenda.pdf.

43 Draft ATSC 3.0 Order ¶ 34.

44 To the extent that broadcasters are concerned that the Commission will not act sufficiently quickly on applications subject to standard processing, we would not object to the imposition of a "shot-clock" or similar mechanism.

45 Draft ATSC 3.0 Order ¶¶ 22-26.

46 *Id.* ¶ 22.

47 *Id*.

48 *See id.* ¶ 23 (exempting "enhanced capabilities" from substantial similarity requirement).

49 5 U.S.C. § 706(2)(A) (prohibiting arbitrary and capricious agency decisionmaking).

50 Draft ATSC 3.0 Order, ¶ 14.

some other point) to determine whether, in light of marketplace developments, it remains necessary. But that later re-examination should not have a "default" or predetermined outcome, as suggested in the draft order.

B. Retransmission Consent.

For reasons we have elaborated on throughout this proceeding,[51] we continue to believe that the best and most effective way to make the ATSC 3.0 transition truly "voluntary" is to require separate negotiations for first-time carriage of ATSC 3.0 signals. In light of the record evidence showing that broadcasters are *already* seeking ATSC 3.0 carriage,[52] we cannot agree with the draft order's conclusion that it is "premature" to address retransmission consent issues.[53]

We appreciate the draft order's reminder that parties must continue to negotiate in good faith.[54] We urge more specific guidance along the following lines:

> *We make clear, however, that MVPDs are under no statutory or regulatory obligation to carry any 3.0 signals and remind parties of the statutory requirement that they negotiate in good faith. Under certain circumstances, a broadcaster's insistence on ATSC 3.0 carriage could constitute bad faith.*[55] *We expect market developments and consumer acceptance to drive MVPD carriage of ATSC 3.0.*

C. Notice.

We agree with the MVPD notice requirements proposed in the draft order.[56] We do not, however, believe that they should be limited to must-carry stations.[57] The post-incentive auction channel sharing order upon which the requirement is based contains no such restriction.[58] And we can see no reason to create such a distinction. Even if it were theoretically possible for an MVPD to negotiate separate notice provisions with every broadcaster (and update existing agreements, which contain no such language), the results would be tremendously and needlessly

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51 *See, e.g.*, ATVA ATSC Comments at 25.

52 ATVA Oct. 25 Letter at 1.

53 Draft ATSC 3.0 Order ¶ 78.

54 *Id.*

55 47 C.F.R. § 76.65(b).

56 Draft ATSC 3.0 Order ¶¶ 75-76.

57 *Id.* ¶ 75.

58 *Incentive Auction Order* ¶ 51.

inefficient for all concerned. A single set of rules for all broadcasters would promote efficiency and prevent consumer disruption.[59]

D. Significantly Viewed Status.

In our initial comments, we argued that simulcasting should not change a station's "significantly viewed" status.[60] To our knowledge, no commenter has suggested otherwise. The draft order appears to agree with this approach, but proposes to seek further comment on the issue.[61]

We think the Commission could proceed directly. In its *Notice*, the Commission sought comment "generally" on a "licensed approach" to simulcasts, and specifically asked if it should "apply existing rules from the channel-sharing context."[62] In response to the latter question, we urged the Commission *not* to adopt the channel-sharing approach to significantly viewed status.[63] The choice not to apply a particular channel-sharing rule constitutes a "logical outgrowth" of the issues raised by the Commission's question.[64] If, as we believe to be the case, broadcasters agree with us on this point, the Commission would have even more latitude to proceed.[65]

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[59] In addition, while we take no position on the form of any on-air notice, Draft ATSC 3.0 Order ¶ 87, we do believe that any such notice should inform viewers of potential service loss, format or picture degradation, or non-substantially similar programming.

[60] ATVA ATSC Comments at iv. ("The Commission should ensure that ATSC 1.0 simulcasts do not change MVPD carriage rights or obligations (by, for example, changing the station's 'local market' or the counties in which it is 'significantly viewed').")); *id.* at 41 (suggesting methods by which the Commission could accomplish this goal).

[61] Draft ATSC 3.0 Order ¶¶ 129-30 (tentatively agreeing with ATVA to maintain the *status quo* in the significantly viewed context with respect to ATSC 1.0 signals).

[62] *Authorizing Permissive Use of the "Next Generation" Broad. Television Standard*, Notice of Proposed Rulemaking 32 FCC Rcd. 1670 ¶ 18 (2017) ("*Notice*"); *see also id.* ¶ 23 (seeking comment about how to "ensure that there is not a significant loss of ATSC 1.0 service by Next Gen TV stations as a result of local simulcasting arrangements.")

[63] ATVA ATSC Comments at 41, *citing Incentive Auction Order* ¶ 372.

[64] *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006).

[65] "[T]he APA also requires [courts] to take 'due account' of 'the rule of prejudicial error.'" U.S. *Telecom Ass'n v. FCC,* 825 F.3d 674, 725 (D.C. Cir. 2016) *citing* 5 U.S.C. § 706. "A deficiency of notice is harmless if the challengers had actual notice of the final rule, or if they cannot show prejudice in the form of arguments they would have presented to the agency if given a chance." *Id.* (citations omitted). Thus, when a party "raise[s] [an] idea . . . in its comments" that is not raised in a notice of proposed rulemaking, and other participants engage in a "substantive back-and-forth" on the issue, those participants cannot later

E. Patents.

We continue to believe that the Commission should require the holders of patents in the relevant ATSC 3.0 standards, as well as patents essential to use those standards, to commit to licensing on reasonable and nondiscriminatory terms, just as it did in the DTV transition.[66]

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In accordance with the Commission's rules, I will file one copy of this letter electronically in each of the dockets listed above.

Respectfully submitted,

Michael Nilsson
Counsel to the American Television Alliance

cc: Meeting participants

challenge the agency's acceptance of the idea on procedural grounds as they will have had "actual notice" of the rule adopted. *Id.* at 725-26.

66 *See* ATVA ATSC Comments at 46-47, *citing Advanced Television Sys. and Their Impact Upon the Existing Television Broad. Serv.,* 11 FCC Rcd. 17,771, ¶ 54 (1996) (stating that patents "would have to be licensed … on reasonable and nondiscriminatory terms" and that the Commission "intended to condition selection of a DTV system on such commitments").

APPENDIX A

Meeting Participants

Office and Date of Meeting	Commission Participants	ATVA Participants
Commissioner O'Rielly November 1	Brooke Ericson	Mike Chappell (Executive Director) Maureen O'Connell (Charter) Alison Minea (DISH) Leora Hochstein (Verizon) Stacy Fuller (AT&T) Amanda Potter (AT&T) Ross Lieberman (ACA) Michael Nilsson (Harris, Wiltshire & Grannis LLP)
Commissioner Carr November 1	Nirali Patel[1]	Maureen O'Connell (Charter) Alison Minea (DISH) Leora Hochstein (Verizon) Stacy Fuller (AT&T) Amanda Potter (AT&T) Ross Lieberman (ACA) Michael Nilsson (Harris, Wiltshire & Grannis LLP)
Chairman Pai November 2	Alison Nemeth	Alison Minea (DISH) Leora Hochstein (Verizon) Stacy Fuller (AT&T) Amanda Potter (AT&T) Ross Lieberman (ACA) Michael Nilsson (Harris, Wiltshire & Grannis LLP)
Commissioner Rosenworcel November 2	Kate Black	Alison Minea (DISH) Elizabeth Andrion (Charter) Leora Hochstein (Verizon) Stacy Fuller (AT&T) Amanda Potter (AT&T) Ross Lieberman (ACA) Michael Nilsson (Harris, Wiltshire & Grannis LLP)
Media Bureau (Media Ownership) November 2	Michelle Carey Martha Heller Steven Broeckaert Diana Sokolow Raelynn Remy Ben Arden Chad Guo Jamile Kadre Eugene Kiselev Andrew Wise	Mike Chappell (Executive Director) Maureen O'Connell (Charter) Alison Minea (DISH) Stacy Fuller (AT&T) Amanda Potter (AT&T) Ross Lieberman (ACA) Michael Nilsson (Harris, Wiltshire & Grannis LLP)

[1] Michael Nilsson also spoke with Ms. Patel by telephone on November 2 to answer questions about issues raised in this letter.

Office and Date of Meeting	Commission Participants	ATVA Participants
Media Bureau (ATSC) November 2	Michelle Carey Martha Heller Brendan Murray Kathy Berthot John Gabrysch Kim Matthews Evan Baranoff Nancy Murphy Jonathan Mark Diana Sokolow Raelynn Remy Steven Broeckaert	Mike Chappell (Executive Director) Maureen O'Connell (Charter) Alison Minea (DISH) Leora Hochstein (Verizon) Stacy Fuller (AT&T) Amanda Potter (AT&T) Ross Lieberman (ACA) Mary Lovejoy (ACA) Michael Nilsson (Harris, Wiltshire & Grannis LLP)